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In the Supreme Court of the United States

OCTOBER TERM, 1926

No. 90

THE GOODYEAR TIRE & RUBBER COMPANY, APPELLANT

v.

THE UNITED STATES

APPEAL FROM THE COURT OF CLAIMS

BRIEF FOR THE UNITED STATES

OPINION BELOW

The opinion of the Court of Claims (R. 6) is reported in 60 Ct. Cls. 448.

JURISDICTION

The judgment to be reviewed was entered April 6, 1925, and petition for appeal was filed April 13, 1925. (R. 8.) The appeal was properly taken under Section 242 of the Judicial Code as it stood prior to the Act of February 13, 1925.

QUESTION PRESENTED

In this case a corporation, after issuing shares of stock having a par value of $100 each, evidenced by

certificates which so stated, amended its articles so as to reduce the par value to $1 per share. The old certificates were not recalled, but left outstanding in the hands of stockholders, who transferred them after the reduction in par value. The question presented is whether the stamp tax imposed by the Revenue Acts of 1918 and 1921 on the transfer of shares, at the rate of two cents per $100 of par value, is to be measured by the actual par value at the time of transfer, or that stated on the old certificates.

STATEMENT

This was a suit to recover stamp taxes paid on the transfer of shares of stock of a corporation. The findings show that prior to April 11, 1921, appellant, an Ohio corporation, had an authorized capital stock of $100,000,000, represented by 1,000,000 shares of the par value of $100 each. The ownership of the outstanding shares was evidenced by certificates which stated on their face that the shares were of the par value of $100 each. (R. 4.)

On April 11, 1921, the authorized capital was reduced from $100,000,000 to $1,000,000, and the par value of each share was reduced from $100 per share to $1. (R. 4.) The old certificates were left outstanding. Thereafter, the holders of the stock assigned their shares to holding trustees, to carry out certain other steps in an organization the details of which are not here material.

The Court of Claims indicates that there was some question in its mind whether the assignment was made after the par value was reduced. We think this may be spelled out of the findings. (R. 4.)

It was this transfer of shares having an actual par value of $1, the ownership of which was evidenced by old certificates which stated that the shares had a par value of $100, that was taxed, and on which the Commissioner of Internal Revenue collected a stamp tax of $10,696.98, on the theory that the tax was measured by the par value stated in the old certificates. The appellant claims that the tax on the transfer of stock should have been measured by the actual par value of $1 per share at the time of the transfer, and on that basis the tax would have been $465.06. (R. 5.)

THE STATUTES

Some of the assignments were made in 1921, while the 1918 Act was in force, and some in 1922, after the 1921 Act was operative, but the two Acts are identical so far as applicable here, and it is only necessary to set forth the Act of 1918, which was as follows:

> SEC. 1100. That on and after April 1, 1919, there shall be levied, collected, and paid, for and in respect of the several bonds, debentures, or certificates of stock and of indebtedness, and other documents, instruments, matters, and things mentioned and described

in Schedule A of this title, or for or in respect of the vellum, parchment, or paper upon which such instruments, matters, or things, or any of them, are written or printed, by any person who makes, signs, issues, sells, removes, consigns, or ships the same, or for whose use or benefit the same are made, signed, issued, sold, removed, consigned, or shipped, the several taxes specified in such schedule. The taxes imposed by this section shall, in the case of any article upon which a corresponding stamp tax is now imposed by law, be in lieu of such tax.

SCHEDULE A—STAMP TAXES

* * * * *

3. Capital stock, issued: On each original issue, whether on organization or reorganization, of certificates of stock, or of profits, or of interest in property or accumulations, by any corporation, on each $100 of face value or fraction thereof, 5 cents: *Provided,* That where a certificate is issued without face value, the tax shall be 5 cents per share, unless the actual value is in excess of $100 per share, in which case the tax shall be 5 cents on each $100 of actual value or fraction thereof.

The stamps representing the tax imposed by this subdivision shall be attached to the stock books and not to the certificates issued.

4. Capital stock, sales or transfers: On all sales, or agreements to sell, or memoranda of sales or deliveries of, or transfers of legal title to shares or certificates of stock or of

profits or of interest in property or accumulations in any corporation, or to rights to subscribe for or to receive such shares or certificates, whether made upon or shown by the books of the corporation, or by any assignment in blank, or by any delivery, or by any paper or agreement or memorandum or other evidence of transfer or sale, whether entitling the holder in any manner to the benefit of such stock, interest, or rights, or not, on each $100 of face value or fraction thereof, 2 cents, and where such shares are without par or face value, the tax shall be 2 cents on the transfer or sale or agreement to sell on each share, unless the actual value thereof is in excess of $100 per share, in which case the tax shall be 2 cents on each $100 of actual value or fraction thereof: *Provided*, That it is not intended by this title to impose a tax upon an agreement evidencing a deposit of certificates as collateral security for money loaned thereon, which certificates are not actually sold, nor upon the delivery or transfer for such purpose of certificates so deposited: *Provided further*, That the tax shall not be imposed upon deliveries or transfers to a broker for sale, nor upon deliveries or transfers by a broker to a customer for whom and upon whose order he has purchased same, but such deliveries or transfers shall be accompanied by a certificate setting forth the facts: *Provided further*, That in case of sale where the evidence of transfer is shown only by the books of the corporation the stamp shall be placed

upon such books; and where the change of ownership is by transfer of the certificate the stamp shall be placed upon the certificate; and in cases of an agreement to sell or where the transfer is by delivery of the certificate assigned in blank there shall be made and delivered by the seller to the buyer a bill or memorandum of such sale, to which the stamp shall be affixed; and every bill or memorandum of sale or agreement to sell before mentioned shall show the date thereof, the name of the seller, the amount of the sale, and the matter or thing to which it refers. Any person liable to pay the tax as herein provided, or anyone who acts in the matter as agent or broker for such person, who makes any such sale, or who in pursuance of any such sale delivers any certificate or evidence of the sale of any stock, interest or right, or bill or memorandum thereof, as herein required, without having the proper stamps affixed thereto with intent to evade the foregoing provisions, shall be deemed guilty of a misdemeanor, and upon conviction thereof shall pay a fine of not exceeding $1,000, or be imprisoned not more than six months, or both.

SUMMARY OF ARGUMENT

The Court of Claims held, and the Bureau of Internal Revenue adheres to the view, that the par value stated on the old certificates was the measure of the tax. The arguments used in support of that conclusion are presented in this brief, and on them

and the opinion of the Court of Claims the case is submitted for decision.

The Bureau of Internal Revenue relies on the decision in *United States* v. *Isham,* 17 Wall. 496, and like cases, which hold that in imposing a documentary stamp tax the liability to the duty and its amount are determined by the form and face of the taxed instrument, and not by extraneous evidence.

It is suggested that these cases are not in point; that the tax in this case is on the document evidencing the transfer, and not on the certificates, and that the measure of the tax is not by the terms of the statute to be derived from the taxed instrument, but from another source; that no attempt is made by the taxpayer to show that the taxed documents, which were assignments of shares, were not what they purported to be. The statute states that the par value of the shares shall be the measure. It does not state that the par value stated in the certificates shall control.

ARGUMENT

THE QUESTION IS WHETHER THE ACTUAL PAR VALUE OR THE PAR VALUE STATED IN THE CERTIFICATES IS THE MEASURE OF THE TAX

The argument presented on behalf of the United States to the Court of Claims, and which adequately presents the views of the Commissioner of Internal Revenue, was as follows:

> We agree with the plaintiff that "face value" means the same as "par value," and

no time need be devoted to any attempt to distinguish between the two terms.

The plaintiff contends that, since the corporation has changed on its books and in its amended certificate of incorporation the par or face value of its common stock from $100 to $1.00 per share, the latter must be the face or par value for purposes of transfer tax, irrespective of the fact that reference to the certificates themselves indicates that the par value of the stock to be transferred is $100 per share. In other words, if the contention of the plaintiff be sustained, the Government, whenever a certificate is presented for the imposition of stock transfer tax, must have recourse to the records of the corporation issuing said stock, or to the records of the proper State, to ascertain whether the par or face value per share indicated on the certificate itself is correct.

That the taxing authorities must look to the form and face of the instrument rather than to extraneous evidence as to what the instrument purports to be has been decided in many cases.

In *United States* v. *Isham,* 17 Wall. (84 U. S.) 496, 504, where the question was whether a certain instrument was a check and subject to the stamp tax levied by the Act of June 30, 1864 (13 Stat. 298), as amended by the Act of July 13, 1866 (14 Stat. 144), it was held that in determining whether an instrument should be stamped or not regard is to be had to its form rather than to its operation. The Court said:

"The liability of an instrument to a stamp duty, as well as the amount of such duty, is determined by the form and face of the instrument, and cannot be affected by proof of facts outside of the instrument itself.

* * * * *

"It is not permissible to the courts, nor is it required of individuals who use the instrument in their business, to inquire beyond the face of the paper. Whatever upon its face it purports to be, that it is for the purpose of ascertaining the stamp duty."

And at page 506 the Supreme Court stated what is distinctly applicable here:

"The adoption of a rule that the form of the instrument can be disregarded, and its real character be investigated for the purpose of determining the stamp duty, would produce difficulties and inconveniences vastly more injurious than that complained of."

This decision has been followed in many cases, of which the following are enlightening in the consideration of this case:

Danville B. & L. Association v. *Pickering,* 294 Fed. 117;

Haverty Furniture Company v. *The United States,* 286 Fed. 985;

Merchants' Warehouse Company v. *McClain,* 112 Fed. 787, 788;

Granby Mercantile Company v. *Webster,* 98 Fed. 604.

In the case of *Malley, Collector,* v. *Bowditch* et al., 259 Fed. 809, the Circuit Court of Appeals for the First Circuit held that

the tax imposed by Schedule A of the Act of October 22, 1914 (38 Stat. 745, 753, 759), on "each original issue, whether on organization or reorganization, of certificates of stock by any such association, company, or corporation, * * *" applied to certificates of shares issued by a manufacturing company organized in the form of a trust under the common law and deriving none of its rights, benefits, or qualifications from any statute. In so holding the Court said:

"We are called upon to apply a statute imposing *stamp taxes upon documents* of a certain class, and which assumes that these documents may be issued not only by corporations, but by associations and companies. These may have this in common—a share capital of fixed amount. Whether the share capital is fixed by agreement or under statutory authority seems immaterial for the tax is not a franchise tax or a corporation tax, but *a stamp tax or document tax* * * *. *The stamp tax is contingent upon the original issue of 'certificates of stock,' just as the stamp tax on checks is contingent upon the issuing of checks.*

"*A stamp tax on documents discriminates between those who do and those who do not issue documents.* * * *

"The certificate is but a muniment of title—documentary evidence of ownership—and not the share itself.

* * * since the present statute does not impose a franchise tax, but imposes a stamp

tax upon various kinds of documents which may be issued by companies neither incorporated nor quasi-incorporated, 'or for or in respect of the vellum, parchment, or paper upon which such instruments, matters, or things or any of them are written or printed,' etc. See Section 5, 38 Stat., pt. 1, page 753." (Italics ours.) *Malley* v. *Bowditch,* 259 Fed. 811, 812.

The foregoing views of the Circuit Court of Appeals for the First Circuit were cited with approval in *Edwards* v. *Wabash Ry. Co.*, 264 Fed. 610, in which the Court said:

"This the defendant contends is a tax imposed on documents rather than on the transaction of which they may be a part. 'Stamps are imposed, not on transactions, but on documents.' And our attention is called to a case, *Malley* v. *Bowditch,* 259 Fed. 809, ——— C. C. A., ———, decided at the October Term, 1918, by the Circuit Court of Appeals in the First Circuit, in which the Court is said to have used this language:

" 'We are called upon to apply a statute imposing stamp taxes on documents of a certain class, and which assumes that these documents may be issued, not only by corporations, but by associations and companies * * *. The tax is not a franchise tax, or a corporation tax, but a stamp tax or document tax.'

"*We see no reason for doubting the accuracy of the above statement. We certainly*

*have no intention of denying the proposition * * *.*" (Italics ours.) *Edwards* v. *Wabash Ry. Co.*, 264 Fed. 610.

Stamp taxes are not imposed upon *transactions* but upon *documents*. *Merchants' Warehouse Company* v. *McClain*, 112 Fed. 787.

The act under which the tax here imposed was levied and collected provides for a stamp tax on "transfers of legal title to shares or certificates of stock." The plaintiff contends that "the tax is on the sale or transfer of capital stock, not on the delivery of the certificates."

A reading of the foregoing quotation from the Act will demonstrate, we contend, that the tax is a tax on the transfer of the legal title to shares or certificates of stock. The transfer of the legal title is evidenced by the delivery of assigned stock certificates; and the measure of the tax is the face value of the shares or certificates

The situation here presented is one for which the plaintiff corporation is alone responsible. It could have called in the $100 par certificates and issued in exchange therefor $1.00 par certificates, in which event no issue tax would have been payable on the issue of the latter stock. (*Cuba Railroad Company* v. *The United States*, D–41, decided January 26, 1925.) (Incidentally, it may be remarked that the *Cuba Railroad Company case* has no other bearing on this case. It involved an *issue* tax—this case a transfer tax.) It did not do this; instead it permitted the $100 par-value certificates to

remain unchanged in the hands of the owners until after the reorganization of May 21, 1921. Then the plaintiff in the manner set forth in the statement of the case called in the outstanding par-value stock certificates and issued new certificates for non-par-value stock on the basis of one share of the non-par for one share of the old par-value stock. This arrangement was consummated by the owners of the certificates representing the outstanding stock assigning the same to certain voting trustees and delivering them to a named depositary. This transfer, from the original owners to the voting trustees, is the transfer in question here, and is admittedly taxable, the controversy being what par value governs for purposes of fixing the amount of tax due.

The argument by the plaintiff that an increase in par value from $100 to $1,000 per share would not escape taxation ignores the matters here in issue and seems to result from a failure to distinguish *issue* tax from *transfer* tax. In the event of such an increase there would be either an increase of the capital of the company (and in such event the new stock would be taxable as an original issue), or an exchange on a fractional share basis (in which event there would be no issue tax). In any case, however, where certificates of stock are transferred from one owner to another, the amount of the transfer tax is measured by the "par or face value of the shares or certificates,"

if they have a face value, and not by any other standard.

The real question in this case is whether Congress intended to impose upon the officials of the Bureau of Internal Revenue the burden of verifying the statements on the face of certificates of stock offered for transfer, by reference to the minutes and other records of the corporation issuing the stock in question, or to the records of the State in which the corporation is organized or reorganized, or, as suggested by counsel for the plaintiff, "by reference to any investment manual." A simple and easy method of legally avoiding this tax was open to the plaintiff corporation. It did not avail itself thereof; and its petition, under the foregoing authorities, must fail.

Here concludes the argument submitted by the United States in the Court of Claims.

As the Court of Claims accepted this argument and the Bureau of Internal Revenue still adheres to it, the case is submitted to the Court for decision, although I am not able to support the decision below.

The above arguments seem to overlook the fact that the tax in this case is imposed on the document evidencing transfers or assignments of shares or certificates of stock, and the tax is not imposed on the certificate itself. There is a tax on instruments evidencing the transfer of shares of stock whether

or not there is any outstanding certificate evidencing ownership.

The principle established in *United States* v. *Isham* and the other cases cited above is not questioned. That principle is that the liability of an instrument to a stamp duty as well as the amount of that duty is determined by the form and face of the instrument taxed, and can not be affected by proof of facts outside the instrument itself. In the *Isham case* the law imposed a documentary stamp tax on memorandum checks. The question was whether the taxability of an instrument appearing on its face to be a memorandum check was to be determined by its character as thus disclosed, or by extraneous evidence as to its true nature.

Here, if the appellant were endeavoring to show that the documents taxed, which on their face purported to be assignments or transfers of shares, were not in fact such, and therefore not taxable, the *Isham case* would be applicable, but it seems obvious that the appellant is not attempting to do that and the *Isham case* is not in point. Neither is this case like one involving a documentary stamp tax on a promissory note, bond, or other like instrument, where the amount stated on the face of the taxed instrument measures the tax.

The statute in this case, imposing documentary stamp taxes on instruments evidencing transfers of shares, does not provide that the taxed instrument shall disclose the measure of the tax. On

the contrary, the statute requires evidence extrinsic to the taxed instrument to determine the measure of the tax. An instrument of transfer does not ordinarily or necessarily mention the par value of the shares transferred. While the par value may be stated in the certificate, it is not the certificate which is taxed.

The measure of the tax is the par value of the shares transferred by means of the taxed document. Consequently, the principle stated in the *Isham case,* that the amount of the tax is determined from the face of the taxed instrument, has no application here.

It does not appear that paragraph 4 of Schedule A of the Revenue Act is so worded as to require the construction that the par value on which the tax is measured is the par value stated in the certificate evidencing ownership of stock. Certainly, that can not be the measure of the tax where there are no certificates outstanding. Shares may be issued, owned, and transferred without there being any certificates issued evidencing ownership. The statute is open to the construction that the par value referred to is the par value of the shares rather than the amount stated in the certificates. It does not seem likely that Congress intended that if shares having an actual par value of $100 each are, by intention or mistake, evidenced by certificates which erroneously state the par value to be $1 each, the transfer of the shares may escape with a stamp tax

on the $1 basis. The statute is somewhat loosely drawn, and does not clearly distinguish between shares of stock and certificates evidencing ownership of shares.

Paragraph 3 of Schedule A, imposing a stamp tax on the issue of certificates, if literally construed, seems to require that the face or par value stated in the issued certificates shall control, and, on the theory that consistency is to be desired, this may lend some support to the decision of the Court of Claims.

The statement as to the par value of shares contained in the certificates evidencing their ownership is no doubt prima facie evidence of the actual par value, but is not conclusive. It is a very unusual case where the certificate does not show the true par value.

Although entertaining this opinion of the case, I feel obliged to ask the Court to examine the question and decide it.

Respectfully submitted.

WILLIAM D. MITCHELL,
Solicitor General.

DECEMBER, 1926.

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